

# Press Freedom Versus Freedom to Suppress

Judge Murray Gurfein's decision in the New York Times case, refusing to enjoin the Times from publishing its "Pentagon Papers," was a courageous ruling for a jurist hearing his first case on the bench. It also was the right one.

It does not mean, unfortunately, that the Times can resume its controversial series today. By order of the United States Court of Appeals in New York, a restraining order against the newspaper has been extended to noon Monday. Thus the Times is blocked from publishing more of the disputed material before next Tuesday.

Tuesday is also the next target day for the Washington Post, which has some Pentagon Papers of its own and has been temporarily restrained by our own U.S. Court of Appeals from publishing more of them.

It is a boiling legal cauldron; no one can say at the moment what finally will be cooked up. It is fervently to be hoped, however, that the ultimate decisions as to the Times, The Post, and other newspapers that may become involved, defeat the government's efforts at repression.

There is a principle here which is vital to the proper functioning of the American system, and it has nothing whatsoever to do with the merits of the published articles derived from a three-year-old Defense Department study of our own Vietnam decision-making process.

The Star has expressed, and may well express again, editorial reservations about the value of those sensational disclosures. Their implication is that the American effort in Vietnam, from the beginning, has been a shabby fraud and that officials of this government were, all along, cynical liars and plotters. Such a conclusion, in our view, is not justified on the basis of a partial, selective record of raw contingency plans, memoranda and minutes. The Pentagon Papers are part of the story. The whole story is not so simple or so sad.

But that is another issue. Of more importance at the moment is the titanic legal contest arising out of the government's efforts to prevent publication of the offending articles. The court battles of this past week, and those to come, are certain to have a historic and critical effect on the principle and practice of press freedom in this country.

The Post litigation is too undeveloped

for meaningful comment at this stage. Let us concentrate here on the Times, recognizing that its situation has much in common with that of the Post—or indeed of any newspaper that may be threatened with gag law.

First things first. If the First Amendment to our Constitution has not lost its meaning, the Times had an unqualified right to print its stories. Ethically, it had a responsibility to consider the effect of publication on the nation's security. Legally, it was subject to criminal penalties if publication could be shown to have breached security. But when the government undertook, before the fact, to forbid the Times to report what had been learned, it embarked on a form of repression which has no significant precedent in our history.

True, the only damage to the Times as a result of the four-day publication delay originally imposed by the court was that the Post meanwhile published other pieces of the story. But if Judge Gurfein had escalated his restraining order into a full-fledged injunction yesterday—or if an injunction were to be ordered by a higher court—then the precedent for future repression is plain to see. Does the government suspect that investigation into certain sensitive areas may result in disclosures contrary to the national interest? It may enjoin the press from publication. What areas can be presumed free of the possibility of such government-asserted sensitivity?

It is disingenuous to say, as government spokesmen do, that the present issue arises only because the Times articles are based on "classified" documents. The root principle that would be established were the government to prevail in such a case is that government may forbid a disclosure without even knowing what the disclosure is to be. The manifest danger of such blind censorship resulted in the doctrine, sacrosanct from Blackstone's day, that while the press may be held to legal account for its publications, it must never be subject to "previous restraints" on what it can publish. To impose such restraints, said Blackstone, "is to destroy the freedom of the press."

So—the Times had a constitutional

right to print its articles. This is not to say, necessarily, that it should have printed them. Knowingly to report material which will damage the security of the nation is not responsible journalism. Such decisions are the hardest that a news executive can face; they involve an agonizing balance of concerns. They cannot be second-guessed by an outside editor not confronted by all the facts and advice—the precise situation—on which the man in the hot seat acted. In this case, there are knowledgeable people, including some involved in the events described, who say flatly that there is no security problem in the material published so far. There are others, including official government spokesmen, who say otherwise, particularly as regards the use of verbatim texts of coded messages.

In any event, the Times has stated editorially that it would not have made the decision it did "if there had been any reason to believe that publication would have endangered the life of a single American soldier or in any way threatened the security of our country or the peace of the world." The Times had three full months in which to test its assumptions as to security. If its editorial faithfully reflects the conclusion that was reached, the Times was bound to publish what it had learned. If the press is serious about its obligation to the public, it cannot allow someone else to decide for it what the public should know.

Again, this is not to say that the Times' assessment of the security issue necessarily was correct. Here, at last, is a question of fact which, if the government chooses to press criminal charges, can properly be determined in court. The burden, however, must be on the government to prove that, in fact, security has been violated. It is not enough to establish that some official once marked these documents "secret," even "top secret." A scandalous array of documents is so classified. Their content regularly finds its way into news reports, much of it leaked by government officials.

The alleged security violation, moreover, must be shown to involve the actual safety of the nation. Embarrassment to public officials, present or past,